(17,507.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 393.

HENRY BOLLN, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1899.

1 In the Supreme Court of the United States.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.

Comes now the plaintiff in error, and under rule 10 of this court makes a statement of the errors on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, to the end that the same, and no more, may be printed, as required by said rule—that is to say:

All of the first page of said record and that part of the 2nd page commencing at the top and ending with and including the word "to wit," in the 9th line thereof.

All of the 66th paragraph, found on page 10.
All of the 67th paragraph, found on page 10.
All of the 68th paragraph, found on page 10.
All of the 69th paragraph, found on page 10.
All of the 70th paragraph, found on page 10.
All of the 84th paragraph, found on page 11.
All of the 85 paragraph, found on page 12.
All of the 93rd paragraph, found on page 12.
All of the 94th paragraph, found on page 12.

That part of page 28 commencing with and including the words "the plaintiff in error," on the 4th line, down to and including the words "D. A. Campbell, clerk," on the 14th line, so that the part of the record hereinbefore indicated may read in words and figures following, to wit:

2 HENRY BOLLN
v.
STATE OF NEBRASKA. } No. 8508.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 5th day of January, 1897.

Present: Hon. A. M. Post, chief justice; Hon. T. O. C. Harrison, Hon. T. L. Norval, judges.

Attest: D. A. CAMPBELL, *Clerk.*

Be it remembered that on the 21st day of May, 1896, there were filed in the office of the clerk of said court a certain petition and transcript in words and figures following, to wit:

In the Supreme Court of Nebraska.

HENRY BOLLN, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant. } Petition in Error.

The plaintiff complains of the defendant for that, on the 16th day of May, 1896, the defendant herein procured a judgment of

conviction against the plaintiff for embezzlement and procured a sentence to be imposed upon the plaintiff in the penitentiary in the district court of Douglas county in a criminal proceeding in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of the proceedings containing such final judgment is filed herewith

3 The plaintiff alleges that there is error in said proceedings, judgment, and sentence, in this, to wit:

66. The court erred in overruling defendant's motion to quash, filed April 4th, 1896.

67. The court erred in sustaining the demurrer of the State to the first paragraph of defendant's plea in abatement.

68. The court erred in sustaining the demurrer of the State to the second paragraph of defendant's plea in abatement.

69. The court erred in sustaining the demurrer of the State to the third paragraph of defendant's plea in abatement.

70. The court erred in sustaining the demurrer of the State to the fourth paragraph of the defendant's plea in abatement.

84. The court erred in overruling defendant's motion for a new trial.

85. The court erred in denying the demand of the defendant for a jury trial upon the issue of fact raised by the ninth paragraph of defendant's plea in abatement and the reply of the State thereto.

93. The court erred in overruling the defendant's specific demurrer, filed April 8th, 1896, to the information.

94. The court erred in overruling the defendant's general demurrer, filed April 8th, 1896, to the information.

The plaintiff in error therefore prays that said verdict herein be set aside and that said judgment and sentence be reversed and a new trial granted in said cause, and for such other relief as justice may require.

HENRY BOLLN,
Plaintiff in Error,
By JOEL W. WEST,
By JOHN M. MACFARLAND,
His Attorneys.

Endorsed: 8508. Bolln *v.* State. Petition in error. Supreme court of Nebraska. Filed May 21, 1896. D. A. Campbell, clerk.

4 Second.

Next print:

That further part of page 28 commencing with and including the words "Criminal App. Doc. No. 1, page 7," down to and including the words "Be it remembered that," in the second line from the bottom.

Then next, that part of page 43 commencing with and including the words "afterward, on the 2nd day of April," near the middle of the page, down to the bottom of said page; then from the top of page 44 down to but not including the words "count second."

Then next, that part of page 46 commencing with and including the words "count fourth" down to the bottom of said page; then from the top of page 47 down to but not including the words "count fifth."

Then next, that part of page 50 commencing with and including the words "count ninth" down to the bottom of said page 50; then next, from the top of page 51 down to but not including the words "count tenth."

Then next, that part of page 52 commencing with and including the words "count eleventh" down to the bottom of said page.

Then next, the first line of page 53.

Then next, that part of page 57 commencing with and including the word "contrary" to the end of the page.

Then next, that part of page 58 from the top down to and including the words "Filed April 2nd, 1896. Albyn L. Frank, clerk," so that the part of the record herein last above indicated shall read in words and figures, to wit:

5 Criminal App. Doc. No. 1, page 7.

Pleas before the Honorable Benjamin S. Baker, one of the judges and the presiding judge of the district court of the fourth judicial district of the State of Nebraska, at a term thereof within and for the county of Douglas, begun and held at the city of Omaha on the 4th day of May, A. D. 1896.

Be it remembered that afterward, on the 2nd day of April, 1896, an information was filed herein; which said information is in the words and figures following, to wit:

Information.

THE STATE OF NEBRASKA, } ss:
County of Douglas, }

Of the February term of the district court of the fourth judicial district of the State of Nebraska within and for the county of Douglas and State of Nebraska, in the year of our Lord one thousand eight hundred and ninety-six, I, Howard H. Baldridge, county attorney in and for the county of Douglas, in said State of Nebraska, who prosecutes for and on behalf of said State in the district court of said district, sitting in and for said county of Douglas, and duly empowered by law to inform of offenses committed in said county of Douglas, come now here in the name and by the authority of the State of Nebraska and give the court to understand and be informed that on the 28th day of July, in the year of our Lord one thousand eight hundred and ninety-three, Henry Bollu, late of the county of Douglas aforesaid, in the county of Douglas and State of Nebraska aforesaid then and there being and then and there being an officer, to wit, city treasurer, of the city of Omaha, in said county, and as such officer being charged with the collec-

tion, receipt, safe keeping, transfer, and disbursement of the public money and a certain part thereof belonging to the city of Omaha, an organized city in the county of Douglas State of Nebraska, then and there unlawfully and feloniously did fraudulently con-
6 vert to his own use and embezzle of said public money twenty-five hundred dollars in money of the value of twenty-five hundred dollars belonging to the said city of Omaha, an organized city in said county of Douglas, State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as said city treasurer, and was then and there a portion of the public money received, controlled, and held by him for safe keeping, transfer, and disbursement as such city treasurer as aforesaid.

Count Fourth.

And the said Howard H. Baldrige, county attorney as aforesaid, upon his oath and by the authority aforesaid further gives the court to understand and be informed that the said Henry Bolln on the said 28th day of July, A. D. 1893, then and there being in said county of Douglas, in the State of Nebraska, and then and there being an officer, to wit, treasurer, of the board of education of the school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, and then and there, as such officer in his official capacity, being charged with the collection, receipt, safe keeping, transfer, and disbursement of a certain part of the public money, to wit, that part belonging to the school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use and embezzle of said public money said twenty-five hundred dollars in money of the value of twenty-five hundred dollars belonging to said school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as said treasurer of the board of education of said school district and by virtue of his being an officer charged with the collection, receipt, safe keeping, transfer, and disbursement of the said public money as aforesaid, and which said money was then and there a portion of the public money received, controlled, and held by him as such officer for safe keeping, transfer, and disbursement as aforesaid; and the said county attorney further says that the offense charged in this count is and relates to the same offense and transaction set out in the first count of this information.

7 *Count Ninth.*

And the said Howard H. Baldrige, county attorney as aforesaid, upon his oath and by the authority aforesaid further gives the court to understand and be informed that the said Henry Bolln, on the said 23rd day of April, A. D. 1895, in the county of Douglas and State of Nebraska, then and there being in said county and

then and there being an officer, to wit, treasurer, of the board o education of the school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, and as such officer then and there being charged with the collection, receipt, safe keeping, transfer, and disbursement of the public money and a certain portion thereof belonging to the said school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use and embezzle of said public money three thousand dollars in money of the value of three thousand dollars belonging to the said school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as said treasurer of the board of education of said school district and by virtue of his being charged with the collection, receipt, safe keeping transfer, and disbursement of said public money as aforesaid, and which said money was then and there a portion of the public money received, controlled, and held by him for safe keeping, transfer, and disbursement as said officer as aforesaid; and the said county attorney further says that the offense charged in this count is and relates to the same offense and transaction set out in the sixth count of this information.

Count Eleventh.

And the said Howard H. Baldrige, county attorney as aforesaid, upon his oath and by the authority aforesaid further gives the court to understand and be informed that the said Henry Bolln on the 10th day of July, 1895, then and there being in said county of Douglas, in the State of Nebraska, and then and there being an officer, to wit, city treasurer, of the city of Omaha, in said county, and as such officer being charged with the collection,
8 receipt, safe keeping, transfer, and disbursement of the public money and a certain part thereof belong- to the said city of Omaha, an organized city in said county of Douglas, in the State of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use and embezzle of said public money one hundred thousand dollars in money of the value of one hundred thousand dollars belonging to the said city of Omaha, an organized city in said county of Douglas, in the State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as city treasurer, and was then and there a portion of the public money received, controlled, and held by him for safe keeping, transfer, and disbursement as such city treasurer as aforesaid, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of Nebraska.

HOWARD H. BALDRIGE,
County Attorney.

THE STATE OF NEBRASKA, } ss:
County of Douglas, }

I, Howard H. Baldrige, county attorney, being first duly sworn, on oath depose and say that I know the contents of the foregoing information; that I have read the same, and the facts set forth in said information are true to the best of my knowledge and belief.

HOWARD H. BALDRIGE.

Subscribed in my presence and sworn to before me this 2nd day of April, A. D. 1896.

EBEN K. LONG,
Justice of the Peace.

Endorsed: App. Doc. 1, No. 7. Charge, embezzlement and grand larceny. Douglas county district court. The State of Nebraska *vs.* Henry Bolln. Information. Filed April 2nd, 1896. Albyn L. Frank, clerk.

9 Third.

Next print all of page 61 and that part of page 62 from the top down to the end of the 4th paragraph, concluding with the words "due process of law," in the 5th line from the top.

Next, that part of page 63 commencing with and including the words "J. W. West," in the 6th line from the bottom, and concluding with the words "Attorneys for defendant," in the 4th line from the bottom; so that the part of the record indicated by this third paragraph of the instructions shall read in words and figures following, to wit:

10 Afterward, on the 4th day of April, 1896, motion to quash was filed herein; which said motion is in the words and figures following, to wit:

Motion to Quash.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff, }
vs. } Motion to Quash.
HENRY BOLLN, Defendant. }

Comes now the defendant, Henry Bolln, and moves the court to quash the 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 counts of the information filed herein and each of them upon the following grounds:

1. That there is no authority of law under and by which the county attorney is authorized to file an information charging this defendant with a felony.

2. Because the defendant under section 10 of article 1 of the constitution of the State of Nebraska has granted immunity from answering to a criminal charge except upon presentment or indict-

ment of a grand jury, and which immunity has not been by the legislature abrogated.

3. Because this prosecution is in contravention with section 3, article 1, of the constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty with- due process of law.

4. Because this prosecution is in contravention of section 1 of article 14 of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law.

J. W. WEST,
JOHN M. MACFARLAND,
Attorneys for Defendant.

11 Fourth.

Next print that further part of page 63 commencing with the word "afterward," in the 3rd line from the bottom, to the end of the page, and then all of page 64, and then that part of page 66 commencing with the words "J. W. West" down to the bottom of the page; so that the part of the record indicated by this 4th paragraph of the instructions shall read in words and figures following, to wit:

12 Afterward, to wit, on the 4th day of April, 1896, plea in abatement was filed herein; which said plea in abatement is in the words and figures following, to wit:

Plea in Abatement.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
HENRY BOLLN, Defendant. } Plea in Abatement.

Comes now the defendant, Henry Bolln, in his own proper person and prays judgment that said information may be quashed for the following reasons:

1. That there is no authority of law under and by which the county attorney is authorized to file an information charging this defendant with a felony.

2. Because the defendant under section 10 of article 1 of the constitution of the State of Nebraska has granted immunity from answering to a criminal charge, except upon presentment or indictment of a grand jury, and which immunity has not been by the legislature abrogated.

3. Because this prosecution is in contravention with section 3, article 1, of the constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty without due process of law.

4. Because this prosecution is in contravention of section 1, article

14, of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law.

J. W. WEST &
JOHN M. MACFARLAND, *Att'ys.*
HENRY BOLLN, *Defendant.*

STATE OF NEBRASKA, } ss:
Douglas County, }

Henry Bolln, being first duly sworn, depose- and says that the facts stated in the foregoing plea in abatement are true as he verily believes.

HENRY BOLLN.

Subscribed in my presence and sworn to before me this 4th day of April, 1896.

[SEAL.] ALBYN L. FRANK, *Clerk.*

13 Fifth.

Next print all of page 67 and that part of page 68 down to and including the words "H. H. Baldrige, county attorney," so that the part of the record indicated by this fifth paragraph of the instructions shall read in words and figures as follows, to wit:

14 Afterward, on the 4th day of April, 1896, demurrer to plea in abatement was filed herein; which said demurrer is in the words and figures following, to wit:

Demurrer to Plea in Abatement.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff, *vs.* HENRY BOLLN, Defendant. } Demurrer to Plea in Abatement.

Comes now the plaintiff, The State of Nebraska, and demurs separately to each and every one of the following paragraphs of the plea in abatement of the defendant filed herein, to wit, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, for the following reasons:

1st. Said paragraphs do not state facts sufficient to constitute a defense to this action.

2nd. That said paragraphs do not state facts sufficient to raise an issue upon the plea in abatement.

3rd. That the statement in said paragraph is not sufficient to constitute a plea in abatement.

4th. That the said paragraph does not allege any facts extrinsic to the record.

5th. That the said paragraph is not sufficient in substance to constitute a plea in abatement or a defense to this action.

6th. That said paragraph is insufficient in law to constitute a plea in abatement.

7th. That said paragraph is insufficient in law to constitute a defense to this action.

15 And further plaintiff demurs to the entire plea in abatement of the defendant filed herein, for the reason that said plea in abatement is insufficient in law to constitute a plea in abatement and does not state facts sufficient to raise an issue upon a plea of abatement and is insufficient in law to constitute a plea in abatement or a defense to this action.

H. H. BALDRIGE,
County Attorney.

16 Sixth.

Next print that further part of page 68 commencing with and including the words "afterward, at the February term of said court," down to and including the words "also coming," in the 5th line from the bottom.

Then that part of page 69 commencing with and including the word "whereupon," in the 2nd line from the top, down to and including the words "duly excepts," in the sixth line from the top.

Then that further part of page 69 commencing with and including the words "afterward, at the February term of said court," down to the bottom of the page.

Then all of page 70, so that the part of the record indicated by this sixth paragraph of the instructions shall read in words and figures as follows, to wit:

17 Afterward, at the February term of said court and on the 4th day of April, 1896, an order was entered herein as follows, to wit:

Order.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming.

Whereupon this cause came on further to be heard upon the motion of the defendant filed herein for an order quashing the said information herein, and the court, on consideration, being fully advised in the premises, overrules said motion; to which ruling of the court the defendant duly excepts.

Afterward, at the February term of said court and on the 6th day of April, 1896, an order was entered herein as follows, to wit:

Order.

STATE OF NEBRASKA *vs.* HENRY BOLLN. } Information. Embezzlement and Larceny.

This day again came the county attorney on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming, and this cause now coming on for hearing upon demurrer to the plea in abatement filed herein by defendant, and the said demurrer having been heretofore argued by counsel and submitted to and taken under advisement by this court, the court doth now, after due consideration and being fully advised in the premises, sustain the said demurrer as to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, and 18th reasons therein set forth; to which ruling of the court the defendant, by his counsel, duly excepts; and the court doth overrule the said demurrer as to the 9th reason therein set forth, with leave to
18 the State to reply instanter, the State duly excepting to the overruling of the 9th reason.

Afterward, on the 6th day of April, 1896, reply to the plea in abatement was filed herein; which said reply is in the words and figures following, to wit:

Reply to Plea in Abatement.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff, *vs.* HENRY BOLLN, Defendant. } Reply to Plea in Abatement.

Comes now the plaintiff, The State of Nebraska, and by leave of court first had and obtained, for reply to the ninth paragraph of the defendant's plea in abatement, heretofore filed herein, denies each and every allegation in said paragraph contained, except as herein expressly admitted.

Plaintiff admits that defendant has had no preliminary examination for said crime referred to in said 9th paragraph, but alleges that said defendant did waive said preliminary examination and his right thereto, as shown by the records of the court.

H. H. BALDRIGE,
County Attorney.

19 Seventh.

Next print the last three lines on page 73, commencing with and including the words "Afterward, on the 8th day," and then—

Next print all of page 74; then that part of page 75 from the top down to and including the words "The defendant duly excepts," in the 10th line from the top; then that further part of page 75 com-

mencing with and including the words "Whereupon, after the introduction," in the 9th line from the bottom, down to and including the words "duly excepts," in the 3rd line from the bottom.

Then that part of page 76 commencing with and including the words "And this cause now coming on," in the 4th line from the top, down to and including the words "entered a plea of not guilty for defendant," in the 16th line from the top, so that the part of the record indicated by this 7th paragraph of the instructions shall read in words and figures as follows, to wit:

20 Afterward, on the eighth day of April, 1896, demurrer was filed herein; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
HENRY BOLLN, Defendant. } Demurrer.

The said Henry Bolln, in his own proper person, comes into court here, and having been heretofore furnished with a copy of said information says that said information and facts therein contained and stated in manner and form as they are stated in said information are not sufficient in law, as they do not constitute an offense punishable by the law of this State, and that he, the said Henry Bolln, is not bound by the laws of the land to answer the same. Wherefore, for want of sufficient information in this behalf, the said Henry Bolln prays judgment and that by the court he may be dismissed and discharged from said premises in the information specified.

J. W. WEST,
JOHN M. MACFARLAND,
Attorneys for Defendant.

Afterward, at the February term of said court, and on the 8th day of April, 1896, an order was entered herein as follows, to wit:

Order.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming, and both the defendant and the State announcing that they are now ready to proceed to trial upon the 9th paragraph of defendant's plea in abatement filed herein, thereupon defend-
21 ant demands a trial by jury, and the court, on consideration, overrules the said demand; to which ruling of the court the defendant duly excepts.

Whereupon, after the introduction of evidence both on the part of the State and of the defendant, and upon due consideration thereof, being fully advised in the premises, the court finds that the defendant waived a preliminary examination before the examining magistrate, and therefore finds against the defendant and overrules the said 9th paragraph of the said plea in abatement; to which ruling of the court the defendant duly excepts.

And this cause now coming on for further hearing upon the defendant's general demurrer filed herein to the information in this case, the court, on consideration, being fully advised in the premises, overrules the said demurrer; to which ruling of the court the defendant duly excepts.

Thereupon, the defendant now being duly arraigned for plea, the county attorney reads to the defendant each and every of the counts in the information herein, and the defendant to each and every of the said counts in the said information, as read to him by the county attorney, by his counsel refused to plead, and to each and every of the said counts in the said information, as read to him by the county attorney, the defendant stood mute; whereupon the court entered a plea of not guilty for defendant.

22 Eighth.

Next print that part of page 78 commencing with and including the words "Afterward, at the May term," near the middle of the page, down to and including the words "sworn according to law," in the bottom line.

Next print that part of page 127 commencing with the words "Afterward, at the May term," near the top of the page, down to the bottom.

Then all of page 128.

Then that part of page 129 from the top of the page down to and including the words "substantial rights," near the middle of the page.

Then that part of page 130 contained in the 8th assignment, being the 5th line from the top only.

Then that part of page 134, to wit, all of the 66th paragraph, all of the 67th paragraph, all of the 68th paragraph, all of the 69th paragraph, all of the 70th paragraph.

Then, on page 136, all of the 85th paragraph.

Then, on page 137, all of the 94th paragraph.

Then that part of page 151 from and including words "Joel W. West" to and including words "Henry Bolln;" also from and including the words "Afterward, at the May term," toward the top of said page, down to the bottom.

Then all of page 152.

Then all of page 153.

Then all of page 154, so that the part of the record indicated by this 8th paragraph of the instructions shall read in words and figures as follows, to wit:

23 Afterward, at the May term of said court and on the 4th day of May, 1896, a trial was had herein as follows, to wit:

Trial.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

This day came the county attorney, on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming. Thereupon came the following-named persons as jurors, to wit:

Nels Anderson,	Jean Schons,	James Stribbling.
W. G. Anderson,	Gustave Hanson,	Jens Anderson,
Fred Schaf,	Henry Allen,	David L. Carpenter,
John Isberg,	John Blumberg,	Peter Svacina.

who were duly impanneled and sworn according to law.

Afterward, at the May term of said court and on the 9th day of May, 1896, said trial was continued and verdict rendered herein as follows, to wit:

Trial.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

This day came again the county attorney, on behalf of the State of Nebraska, the said defendant, Henry Bolln, appearing in open court, his counsel also coming; also came the jury heretofore impanneled and sworn, in charge of Bailiffs Norberg & Bone, and the trial proceeds.

Jury Retire.

And the said jury, now having heard the charge of the court, retire to their room, in charge of Bailiffs Norberg & Bone, for deliberation.

And afterward, to wit, on this same day, after due deliberation, the said jury returned into open court, in charge of said bailiffs, Norberg & Bone, with their verdict, in writing, signed by their foreman, and say:

Verdict.

In the District Court of Douglas County, Nebraska.

24 THE STATE OF NEBRASKA, Plaintiff,
vs.
HENRY BOLLN, Defendant. } Verdict.

We, the jury duly empaneled and sworn to well and truly try and true deliverance make between The State of Nebraska, plaintiff,

and Henry Bolln, defendant, do find the said defendant guilty of embezzlement in manner and form as charged in the fourth count of the information herein, and find the value of the money so embezzled to be $2,500.00.

We further find the defendant guilty of embezzlement in manner and form as charged in the ninth count of the information herein, and find the value of the money so embezzled to be $3,000.00.

We further find the defendant guilty of embezzlement in manner and form as charged in the eleventh count of the information herein and find the value of the money so embezzled to be $100,000.00.

We find the defendant not guilty upon the first, second, third, sixth, seventh, eighth, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth counts of said information.

JEAN SCHONS, *Foreman.*

Thereupon the said jury were discharged from further consideration of this cause and said defendant remanded to jail to wait sentence.

Afterward, on the 12th day of May, 1896, motion for new trial was filed herein: which said motion for new trial is in the words and figures following, to wit:

Motion for New Trial.

In the District Court of Douglas County, Nebraska.

STATE OF NEBRASKA, Plaintiff, *vs.* HENRY BOLLN, Defendant. } Motion for New Trial.

The defendant, Henry Bolln, moves the court for a new trial in this case for the following reasons affecting materially his substantial rights:

8. That the verdict is contrary to law.

66. The court erred in overruling the defendant's motion to quash, filed April 4th, 1896.

67. The court erred in sustaining the demurrer of the State to the first paragraph of the defendant's plea in abatement.

68. The court erred in sustaining the demurrer of the State to the second paragraph of the defendant's plea in abatement.

69. The court erred in sustaining the demurrer of the State to the third paragraph of the defendant's plea in abatement.

70. The court erred in sustaining the demurrer of the State to the fourth paragraph of the defendant's plea in abatement.

85. The court erred in denying the demand of the defendant for a jury trial upon the issue of fact raised by the ninth paragraph of the defendant's plea in abatement and the reply of the State thereto.

94. The court erred in overruling the defendant's general demurrer, filed April 8th, 1896, to the information.

JOEL W. WEST &
JOHN M. MACFARLAND,
Attorneys for Defendant, Henry Bolln.

Afterward, at the May term of said court and on the 15th day of May, 1896, said motion for new trial was overruled herein as follows, to wit:

Motion for New Trial Overruled.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney, on behalf of the State of Nebraska, the defendant having been brought into court in the custody of the sheriff, his counsel also coming. Thereupon this cause came on for hearing upon the motion of the defendant, filed herein, to set aside the verdict of the jury heretofore rendered in this cause and for a new trial herein, and, after argument by counsel and due consideration, and being fully advised in the premises, it is adjudged by the court that the said motion for a new trial be, and the same hereby is, overruled; to which ruling of the court the defendant duly excepts and, on application, is hereby given forty (40) days from and after the rising of the court at its present term in which to prepare and serve a bill of exceptions herein;
26 and it is hereby further ordered that time for preparing and serving bill of exceptions in the plea in abatement be, and the same hereby is, extended to June 15th, 1896.

Afterward, at the May term of said court and on the 16th day of May, 1896, said defendant was sentenced herein as follows, to wit:

Sentence.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney on behalf of this State of Nebraska, the said defendant, Henry Bolln, having been brought into court in custody of the sheriff, his counsel also coming, and said defendant having heretofore been convicted of embezzlement of the sum of twenty-five hundred dollars ($2,500.00) of moneys belonging to the school district of the city of Omaha, Douglas county, Nebraska, as charged in the fourth (4th) count of the information in this case, was duly arraigned for sentence, and being informed by the court of the verdict of the jury as herein rendered against him, was thereupon inquired of if he had anything to say why the judgment and sentence of the court should not now be pronounced against him, and showing no good and sufficient reason to the contrary, it is therefore considered, ordered, and adjudged by the court that the said defendant, Henry Bolln, be taken hence to the jail of this said county of Douglas, and that thence within thirty (30) days, and as early as practicable, he be taken by the sheriff of this said county of Douglas to the penitentiary of this State and there be confined, at hard labor, for the

period of four (4) years from and after this sixteenth (16th) day of May, A. D. 1896, no part of which period of confinement is by virtue of this sentence to be spent in solitary confinement, and that the said defendant, Henry Bolln, pay a fine of five thousand dollars ($5,000.00) and pay the costs of this prosecution, taxed at — dollars ($—), for which execution is hereby awarded.

The said defendant, Henry Bolln, having been heretofore convicted of embezzlement of the sum of three thousand — ($3,000.00) of the moneys belonging to the school district of the city of
27 Omaha, Douglas county, Nebraska, as charged in the ninth (9th) count of the information in this case, being brought into court in custody of the sheriff, his counsel also coming, was thereupon duly arraigned for sentence and, being informed by the court of the verdict of the jury, as herein rendered against him, was inquired of if he had anything to say why the judgment of the court should not now be pronounced against him, and showing no good and sufficient reason to the contrary, it is therefore considered, ordered, and adjudged by the court that the said defendant, Henry Bolln, be taken hence to the jail of this said county of Douglas and that thence, within thirty (30) days and as early as practicable, he be taken by the sheriff of this said county of Douglas to the penitentiary of this State and there be confined at hard labor for the period of five (5) years, no part of which period of confinement is by virtue of this sentence to be spent in solitary confinement, such term of confinement to begin at the expiration of this sentence of four (4) years this day pronounced by this court against said defendant under fourth (4th) count of the information in this case, and that the said defendant, Henry Bolln, pay a fine of six thousand dollars ($6,000.00), for which execution is hereby awarded.

And the said defendant, Henry Bolln, having been heretofore convicted of embezzlement of the sum of one hundred thousand dollars ($100,000) of the moneys belonging to the city of Omaha, Douglas county, Nebraska, as charged in the eleventh (11th) count of the information in this case, being this day brought into court in the custody of the sheriff, his counsel also coming, was duly arraigned for sentence, and, being informed by the court of the verdict of the jury as herein rendered against him, was thereupon inquired of by the court if he had anything to say why the judgment and sentence of the court should not now be pronounced against him, and showing no good and sufficient reason to the contrary, it is therefore considered, ordered, and adjudged by the court that the said defendant, Henry Bolln, be taken hence to the jail of this said county of Douglas, and that thence, within thirty (30) days and as early as practicable, he be taken by the sheriff of this said county of Douglas to the penitentiary of this State and there be confined at hard labor for the period of ten (10) years, no
28 part of which period of confinement is by virtue of this sentence to be spent in solitary confinement, such term of confinement to begin at the expiration of the sentence of five (5) years this day pronounced by this court against said defendant on the ninth (9) count of the information in this case, and that the said

defendant, Henry Bolln, pay a fine of two hundred thousand dollars ($200,000), for which execution is hereby awarded; to all of which the defendant, by his counsel, duly excepts.

29 Ninth.

Next print all of page 189, all of page 190, all of page 191, all of page 192, all of page 193, all of page 194, all of page 195, all of page 196, all of page 197, all of page 198, all of page 199, all of page 200, all of page 201, all of page 202, all of page 203, all of page 204, all of page 205, all of page 206, all of page 207, all of page 208.

Then next print all of page 209, all of page 210, all of page 211, all of page 212.

Then next print all of page 215.

Then next print all of the petition for the allowance of a writ of error, so that the part of the record indicated by this 9th paragraph of the instructions shall read in words and figures as follows, to wit:

30 And afterward, to wit, on the 18th day of May, 1897, there was rendered by said court and entered of record a certain judgment in words and figures following, to wit:

HENRY BOLLN, Plaintiff in Error, *vs.* STATE OF NEBRASKA, Defendant in Error.	No. 8508.	Error from the District Court of Douglas County. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be, and the same hereby is, affirmed, and that the defendant in error recover of the plaintiff in error its costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 18th day of May, 1897, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

31 HENRY BOLLN *v.* STATE OF NEBRASKA. } No. 8508.

Opinion Filed May 18, 1897.

1. Chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county.

2. A denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error, since the record fails to disclose that the prisoner was in some manner prejudiced thereby.

3. It is not essential to the validity of an information that it should conclude "against the peace and dignity of the State."

4. An opinion formed by a juror does not affect his competency or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged. Basye *v.* State, 46 Neb., 261, followed.

5. An opinion based upon rumor and newspaper reports alone does not afford cause for challenge where it is shown that such opinion will not interfere with the juror's rendering a fair and impartial verdict upon the evidence under the instructions of the court.

6. Under section 124 of the Criminal Code the failure of any public officer to account to or make settlement of his official accounts with the proper legal authority within reasonable time after notice so to do, as well as the refusal of such officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer, is made *prima facie* evidence of embezzlement.

32 7. Held that the accused was not prejudiced upon the trial by the giving of the 15th and 16th paragraphs of the charge of the court.

8. Evidence examined and held sufficient to warrant a conviction for embezzlement of public moneys.

9. Under an information against a public officer charging embezzlement on a certain date evidence of a continuous series of conversions of money by the defendant at different times and in different amounts before that date will support a verdict finding the aggregate sum as the amount of a single embezzlement.

10. The disbursement of public funds by a city treasurer except upon a warrant drawn by the proper authority constitutes embezzlement.

11. A custom or usage repugnant to the commands of a statute will not prevail against such statute.

12. In a criminal prosecution the presence of the defendant at the trial being once shown by the record will be presumed to have continued to the end, where the contrary is not made to appear.

33 NORVAL, *J.*:

Henry Bolln was prosecuted in the district court of Douglas county upon an information filed by the county attorney charging him with the embezzlement of public moneys. The information was in sixteen counts, a part of which charging the defendant with embezzlement of certain moneys of the city of Omaha, and the remaining counts were for the embezzlement of certain moneys belonging to the school district of the city of Omaha. A motion to quash the information was made, which was overruled by the court. A plea in abatement was filed, to which the county attorney interposed a demurrer, which was overruled as to the ninth ground of the plea, and sustained as to the other seventeen grounds therein set forth. The State replied to the ninth paragraph of the plea in

abatement, and the accused demanded a jury trial upon said paragraph of his plea, which was denied, and upon a trial the court it overruled the plea in abatement. The defendant demurred to the several counts of the information, which the court promptly overruled, and the accused, when called upon to plead to the information, having stood mute, the court entered a plea of not guilty for him. The county attorney, by leave of court, entered a *nolle prosequi* as to the fifth and tenth counts of the information, and upon the trial the accused was found guilty as charged in the fourth, ninth, and eleventh counts, but was acquitted as to all the others upon which he was tried. From the denying of his motion for a new trial the defendant has brought this writ of error.

Whilst we are confronted with a record of over 1,000 pages, and a petition in error containing 279 assignments, the questions to be determined are not numerous, since most of the assignments are not discussed in the brief of defendant below. The familiar rule that assignments not relied on the briefs are deemed waived will be adhered to in this case.

34 The first contention of counsel for the accused, and which was raised by the motion to quash the information, plea in abatement, and by demurrer, is that there is no authority in this State for the prosecutions of crimes by information. The power of the legislature to provide by appropriate enactment for the trial of criminal cases in the district court upon informations filed by the public prosecutor or county attorney instead of indictments is not and doubtless could not be successfully questioned in view of section 10, article 1, of the State constitution, which declares, *inter alia*, "that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand-jury system." Certainly the language quoted is broad enough to justify the law-making body to provide for prosecution of offenses by information alone. The argument of the prisoner's counsel is that the legislature of this State has not as yet so enacted, at least by express, plain, and unequivocal language. In 1885 a law was passed, which received executive approval, entitled "An act to provide for prosecuting offenses on information, and to dispense with the calling of grand juries except by order of the district judges." Criminal Code, chapter 54. If said act has not by plain and apt words made suitable provision for the prosecutions of offenses against the penal laws of the State by information, clearly it is not the fault of the title of the law to which reference has just been had. Language which would have more definitely or appropriately designated such a purpose could not easily have been chosen; but it is argued that there is nothing in the title to indicate that the law was intended to provide for the prosecution

35 of felonies by information. This position is not tenable. The title indicates a purpose to provide for the "prosecution of offenses on information," and the word offenses in the sense it is used embraces all infractions of the criminal code of the grade of felonies. In Miller *v.* State, 29 Neb., 437, it was held that a prosecution for

murder may be by information. The object indicated by the title to the act under consideration is clearly enough expressed in the body of the law, as an examination of its several provisions will disclose.

The first section (sec. 578 of said chap. 54) provides: "That the several courts of this State shall possess and may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictments."

By this the same jurisdiction was conferred upon the courts to hear, try, and determine prosecutions for crimes, misdemeanors, and offenses upon information as theretofore existed and had been exercised in like prosecutions upon indictments found by a grand jury. The subsequent sections of the act in connection with the one quoted above not only give authority for the prosecution by information, but point out the procedure as well. Section 2 requires all informations to be filed in term time in the court having jurisdiction of the particular offense by the prosecuting attorney of the proper county, provided that he shall subscribe his name thereto and indorse thereon the names of witnesses. The next section provides for the verifications of all informations and for joining of different offenses and different degrees of the same offense in
36 one information in like manner as could be joined in one indictment. The sixth section empowers the court to direct the prosecuting attorney to file the proper information in certain instances. We do not entertain the shadow of a doubt that the statute in question is ample to authorize a county attorney to file information for felonies in proper cases and to prosecute the accused thereunder. State *v.* Miller, 43 Neb., 860; Korth *v.* State, 46 Neb., 631. The trial of the accused upon the information of the county attorney did not contravene section 3, article 1, of the Constitution, which declares that "no person shall be deprived of life, liberty, or property without due process of law," since under and in pursuance of section 10 of the same article the legislature has authorized prosecution of offenses by information.

The ninth paragraph of the defendant's plea in abatement alleged that he had not had a preliminary examination touching the offenses charged in the information, and that he had not waived the same. To this averment the State replied, admitting that the defendant did not have a preliminary examination, denying each and every other allegation in said paragraph of the plea, and averring that the accused waived his right to a preliminary examination. The defendant demanded a trial by jury upon the issue tendered by the ninth paragraph of the plea in abatement, which was overruled, and the trial court found that the defendant had waived a preliminary examination before the examining magistrate, and accordingly overruled said paragraph of the plea in abatement. The denial of a trial by jury to determine whether the right to a preliminary examination had been waived by the prisoner is assigned for error. Conceding for the

purposes of this case that the accused was entitled to have this question passed upon by a jury, yet the refusal of his request did not work a reversal of the judgment of conviction.

37 Doubtless he could have waived the calling of a jury to pass upon that proposition had he so desired, since the statute does not specify how it shall be determined. It follows that the denial of a jury trial upon the issue in question was unimportant, as the defendant was in no manner prejudiced thereby. Suppose the uncontradicted testimony before the trial court had shown that a preliminary examination upon the crimes charged in the information has been waived by the defendant, he would not have been injuriously affected by the refusal of a jury to pass upon that portion of his plea, for had one been called the verdict must necessarily have been the same as the finding of the court. Error cannot be presumed, but must appear affirmatively to justify a reversal of a cause. The testimony adduced relating to the plea in abatement was not brought into the record by a bill of exceptions, nor is the transcript of the proceedings in the magistrate's court before us; therefore we are unable to determine whether the court below erred in denying the accused a trial of his plea in abatement by a jury. The issue of fact joined on this plea in abatement, involving as it did the question of a record in the case at bar, could be properly determined by the court without the intervention of a jury. This view is not in conflict with Arnold *v.* State, 38 Neb., 752, and Smith *v.* State, 42 Neb., 356, in which cases it was ruled that the trial of an issue of fact tendered by a plea in bar can only be tried by a jury. Those cases lack analogy. They were predicated upon section 449 of the Criminal Code relating to pleas in bar, which in express language requires the issues raised by such pleas to be determined by a jury. The provision of said section is mandatory, and the right thereby accorded the prisoner cannot be waived by him, while the statute and constitution alike are wholly silent as regards the trial of an issue of fact joined upon a plea in abatement.

38 Error is predicated upon the refusal of the trial court to sustain the defendant's motion to quash the several counts of the information. It is insisted that each count except the last one is bad because it did not conclude with the words "against the peace and dignity of the State of Nebraska." The rule sanctioned by long usage has been to conclude each count of an indictment or information with the words above quoted, but we have in this State no constitution or statute requiring it. In some of the States, under a constitutional provision defining what an indictment shall contain, indictments have been held defective which omitted the usual formal concluding words. In the language of Clark, J., in considering the same question in State *v.* Kirkman, 104 N. C., 911: "The conclusion 'against the peace and dignity of the King' was held in England to be necessary in all indictments. No reason was assigned for it except that it had been customary. It furnished no light to the defendant, and its employment was not required by any statute. As every criminal offense is, in its nature, 'against the peace,' its

use is tautology, and doubtless originated in the rhetorical flourish of some ancient and forgotten pleader." By section 412 of our Criminal Code it is provided that "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected; first, by the omission of the words, 'with force and arms,' or any words of similar import; or, second, by omitting to charge any offense to have been contrary to a statute or statutes; or, third, for the omission of the words, 'as appears by the record,' nor for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly; nor for want of a statement of the value or price of any matter or thing, or the amount of damages or injury in any case where the value or price or the amount of damages or injury is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were impanneled, sworn, or charged; nor for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

The object of the legislature in passing the foregoing was to prevent the obstruction of the administration of justice in criminal prosecutions being hampered or impeaded by useless technicalities or nice refinements. The statute has declared that no indictment shall be deemed invalid for any defect which does not tend to the prejudice of the substantial rights of the accused on the merits nor for the omission "to charge any offense to be contrary to a statute or statutes." It is obvious that the omission from the several counts of the information of the usual formal conclusions does not render them bad. Smith *v.* State, 4 Neb., 277; State *v.* Kirkman, 104 N. Car., 911; Peters *v.* State, 12 S. E. Rep. (N. Car.), 74; People *v.* Fowler, 25 Pac. Rep. (Tex.), 1110; Alexander *v.* State, 11 S. W. Rep. (Tex.), 628; Stebbins *v.* State, 20 S. W. Rep. (Tex.), 552.

It is argued that the court erred in not sustaining the defendant's challenge for cause to the juror Charles Bentley. The *voire dire* examination of Mr. Bentley is in the record before us, which discloses that he had an opinion as to the guilt or innocence of the defendant formed solely upon mere rumors and the reading of newspaper comments upon the crimes; that such opinion was not a settled or fixed one, but was conditional upon the truth of what he had heard and read; and, notwithstanding such opinion, he could render a fair and impartial verdict in the case based solely on the law and the evidence. No substantial cause for the challenge of Mr. Bentley existed, since the opinion he entertained was not unqualified as to the guilt or innocence of the accused. Basye *v.* State, 15 Neb., 261. We now reit-

erate what was said in passing upon a similar question in that case.

"If upon the whole examination of the juror it is manifest that the opinion formed by him from reading newspaper accounts of the alleged crime or upon rumor is merely hypothetical or conditional on the truth of the rumor or the newspaper reports read; that he has no settled opinion as to the guilt or innocence of the accused, and that he can render a fair and impartial verdict upon the evidence adduced on the trial under the instructions of the court, the juror is competent. * * * Under the statutes the mere fact that a juror has formed an opinion from what he has heard or read does not disqualify him from acting nor make him incompetent to serve as a juror. It is only when the veniremen has such a settled opinion or the examination shows such a state of mind as will preclude him from returning a true verdict upon the evidence submitted on the trial that he is disqualified. In other words, he is incompetent if he entertains an unqualified or unconditional opinion on the merits of the case, however formed, or an opinion of that fixed character which repels the presumption of innocence of the prisoner. The statute does not by express terms nor by fair implication disqualify one from serving as a juror who has read newspaper reports of the commission of the crime."

41 The errors assigned to the fifteenth and sixteenth instructions will be considered together, as they present the same questions. Instruction fifteen reads as follows: "You are instructed that if you find from the evidence, beyond a reasonable doubt, that the defendant was city treasurer of the city of Omaha, and if you further find, beyond a reasonable doubt, that the said city of Omaha, through its proper officer or through a person authorized so to do, made a demand upon the defendant to settle and account to the said city of Omaha for funds received by the defendant during his term of office as such city treasurer in the regular course of his business as such officer, and if you further find that the defendant neglected and refused to make settlement, and if you further find from the evidence, beyond a reasonable doubt, that there was any money received by the said Henry Bolln, defendant, as such city treasurer, such moneys being received in the regular course of business while the said Henry Bolln was treasurer of the said city of Omaha, and the said money being the property of the said city of Omaha, such demand for settlement and such refusal to turn over to the person authorized by the city of Omaha to receive such money, if you find that the said defendant did receive and hold any money, the property of the city of Omaha, is *prima facie* evidence that the defendant did embezzle such money, as you find, beyond a reasonable doubt, that the defendant did receive for safe keeping, transfer, and disbursement of the moneys of the said city of Omaha and which he refused and neglected to turn over and account for to the said city of Omaha."

The sixteenth instruction differs from the above in that the words "school district of the city of Omaha" are substituted for the words

"city of Omaha" in every place they are employed in said instruction fifteen.

42 The criticism offered upon said instructions is that, under section 124 of the Criminal Code, the presumption of embezzlement does not arise from the failure of a public officer to account to or make settlement for funds in his hands until the expiration of a reasonable time after notice so to do has been given him.

Said section 124 of the Criminal Code relating to the embezzlement of public moneys, *inter alia*, declares that "any failure or refusal to pay over the public money or any part thereof by any officer or other person, charged with the collection, receipt, transfer, disbursement, or safe keeping of the public money or any part thereof, whether belonging to the State, or to any county or precinct, or school district, or organized city *of* incorporated village in this State, or any other public money whatever; or any failure to account to, or to make settlement within a reasonable time after notice so to do, with any proper and legal authority of the official accounts of such officer or person, shall be held and taken as *prima facie* evidence of such embezzlement. And the refusal of any such officer or person, whether in or out of office, to pay any draft, order, or warrant which may be drawn upon him, by the proper officer, for any public money in his hands, no matter in what capacity the same may have been received or may be held by him, or any refusal, by any person or public officer named in this act, to pay over to his successor any public moneys, or securities promptly, on the legal requirement of any authorized officer of the State or county, shall be taken on the trial of any indictment against such officer or person for embezzlement, as *prima facie* evidence of such embezzlement."

By the foregoing the legislature has made either the failure of any public officer to account to or make settlement with the proper legal authority of his official accounts within a reasonable

43 time after notice so to do or any refusal of a public officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer *prima facie* evidence of embezzlement. Both of the instructions under consideration omitted to state that a reasonable time must elapse after notice for settlement and accounting has been received by an officer before the law will raise therefrom any presumption of embezzlement. For this omission a reversal is asked. In the light of the facts before us, we think it should be denied. The record discloses that the defendant was the treasurer of the city of Omaha and *ex officio* treasurer of the school district of said city for two terms. Early in July, 1895, he resigned his office and J. H. Dumont was appointed to fill the remainder of the official term, which expired in January following. A. G. Edwards was the duly elected and qualified successor of the latter. The defendant on July 11, 1895, accounted to and paid over to Dumont, his successor, for $221,705.69, which was only a portion of the funds in his hands belonging to the city of Omaha and the school district of said city,

and he had not at the time of the trial in the court below, on May 9, 1896, accounted for or paid over to the proper officer the residue of the public moneys received by him. On the 30th day of January, 1896, A. G. Edwards, the then treasurer of the city of Omaha and *ex officio* treasurer of said school district for and on behalf of said city, as well as said school district, and in pursuance of instructions from proper officers, made a written demand upon the defendant that he pay to said Edwards all moneys received by the defendant by virtue of his office from whatever source belonging to the city of Omaha and said school district, respectively. To this request and demand the defendant did not comply, but replied, "I cannot pay you, Mr. Edwards."

44 No request for further time in which to account and make payment was ever suggested by the accused; but his refusal to make settlement and payment was unequivocal. The information under which the trial was had was not filed until April 2, 1896. In view of the facts detailed, and the further fact that the defendant had deposited moneys of the city and school district respectively in certain banking institutions and had paid out several thousand dollars of the public funds without warrants or vouchers therefor, the defendant was not prejudiced by the giving of the instructions assailed. More than a *prima facie* case of embezzlement was made out by the uncontradicted evidence adduced on the trial. The statute requires a public officer to pay over to his successor all public funds unaccounted for to his successor promptly upon legal demand being made upon him therefor.

The next contention is that the verdict is not warranted by the evidence. The 4th and 9th counts of the information upon which the defendant was convicted charge the embezzlement of the sums of $2,500 and $3,000, respectively, belonging to the school district of the city of Omaha. It developed on the trial that the defendant had on deposit with the Omaha Loan & Trust Company savings bank about $10,000 of the funds belonging to the school district of Omaha, and of which amount he withdrew from said bank on July 28, 1893, the sum of $2,500. This he received in cash, and the evidence on behalf of the State tends to show that he never charged himself therewith nor accounted therefor or for any part thereof to the school district. The moneys came into his hands as their proper custodian, and he had wholly failed and refused to account for or pay the same over to his successor upon demand. To establish embezzlement it did not devolve upon the State to show how or where the moneys were converted by the defendant to his own use.

45 The proofs adduced by the State in support of the 9th count *is* fully as convincing, and *is* ample to sustain the averments of said count. The State, by uncontradicted testimony, traced the $3,000 of the school money therein mentioned into the hands of the defendant, and he failed and refused to account for the same in any manner whatever.

The other count upon which there was a conviction, the 11th, charges the defendant with the embezzlement of $100,000 of the

moneys of the city of Omaha. The shortage of the defendant for both terms of city treasurer was proven by the State to be $115,188.66. This is conceded in the brief filed by his counsel, although in argument at the bar it was insisted that the larger portion of this amount was made up by charging the defendant twice with the sum realized from one sale of city bonds. An analysis of the evidence fully refutes this contention and establishes that the defalcation of the defendant on account of city funds alone for both terms was over $100,000.

The point is made that a portion of the above shortage in the city funds occurred during the defendant's first term of office and more than three years prior to the filing of the information against him. This feature of the case was passed upon by the jury adversely to the defendant under instruction eleven, given by the court on its own motion, which in clear and explicit language submitted to them that question for consideration. The evidence shows that the embezzlement in the case at bar consisted of a continuous series of acts committed at different times, but with a common purpose, and hence constitute a single offense. State *v.* Reinhart, 38 Pac. Rep. (Ore.), 822; Brown *v.* State, 18 O. S., 496; Jackson *v.* State, 76 Ga., 551; Ker *v.* State, 110 Ill., 627; Gravatt *v.* State, 25
46 O. S., 162; Campbell *v.* State, 35 O. S., 70. Moreover, the evidence is ample to establish that over $100,000 of the funds of the city of Omaha were embezzled by the defendant within three years prior to the commencement of this prosecution.

There was no error in refusing to admit in evidence the communications of Theo. Olsen, comptroller, to the city council, since they did not tend to show that the defendant was not guilty of embezzlement.

When the defendant turned over his office to his successor, Mr. Dumont, there were in the cash drawer, carried as cash, slips and memorandum checks aggregating about $24,000, representing that amount of public funds which he had paid out to and which were carried as charges against various persons, mostly city employés and contractors with the city. The defendant offered to show that it had been the custom of the various city treasurers who had preceded the defendant in office to so pay out city funds. The offer was rejected, and such ruling is assigned as error. The fact, if it be a fact, that the money represented by said slips and checks in the cash drawer was paid out in pursuance of a custom with the knowledge of the city authorities did not make the transaction in question lawful. The disbursement of public funds in that manner was in violation of law, a practice in the highest degree reprehensible, and constituted embezzlement, notwithstanding the transaction was openly done with knowledge of the entire city government and might be sanctioned by a custom or usage as old as the Mosaic law.

Finally, it is argued that the defendant was not present in court when the jury returned their verdict. It is true the record does not affirmatively disclose that the prisoner was present at
47 the time the verdict was received, nor does it appear he was not so present. The journal entry, however, does recite that

Mr. Bolln was in court with his counsel when the jury were instructed, which was the same day the verdict was returned. His presence at the trial having been once shown by the record, the presumption will be indulged that it continued until the end, unless the contrary appears. Folden *v.* State, 13 Neb., 328; Dodge *v.* People, 4 Neb., 220.

We have with much care examined the voluminous record in this case, and have given every proposition argued in the brief for reversal careful consideration, and the conclusion is irresistable that the defendant has been accorded a fair and impartial trial, and, no error which could have prejudiced his substantial rights having been committed, a judgment of affirmance will be entered.

Affirmed.

48 And afterward, to wit, on the 20th day of September, 1897, there *was* filed in the office of the clerk of said court certain assignments of error in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error. } Assignments of Error.

Comes now Henry Bolln, plaintiff in error, and assigns the following errors in the record and proceedings in said cause, as follows:

1. The court erred in holding that "a denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for that section 11 of article 1 of the constitution of the State of Nebraska guarantees that in all criminal prosecutions the accused shall have the right to a speedy public trial by jury, the adoption of which provision was but declaratory of the common law and was intended to make definite and certain what in this State should be in that respect "due process of law."

And with the same end in view, and to make yet more definite and certain the full scope and meaning of said provision and what should constitute "due process of law," and that there might be an unequivocal enunciation of what is "the law of the land" in that behalf in this State, the legislature of the State of Nebraska enacted section 279 of the Code of Civil Procedure, defining "a trial" as "a judicial examination of the issues, whether of law or of fact in an action," whereby plaintiff in error has been deprived of his liberty without due "process of law," contrary to section 1, article 14, of the amendments to the Constitution of the United States.

2. That the court erred in holding that "a denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for the further reason that plaintiff in error asserted and claimed under the Constitution of the United States, to wit, under article 6 of the amendments thereof, the right and privilege of a

trial by jury, which said provision of the Constitution was
49 required to be adopted and was adopted by the people of the State of Nebraska pursuant to section 4 of the act of Congress passed April 19th, 1864, through, by, and under which the State of Nebraska was enabled to adopt a constitution and become one of the States of the Union, by reason of which premises said provision of the Constitution of the United States constitutes in the State of Nebraska that which is "due process of law" and "the law of the land," the decision of the said supreme court of Nebraska being against the right and privilege so asserted and claimed.

3. The court erred in holding that "a denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for that such decision and holding contravenes section 1, article 14, of the amendment of the Constitution of the United States, for that thereby plaintiff in error was deprived of his liberty without "due process of law."

4. The court erred in holding "that chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding is contrary to section 10, article 1, of the constitution of the State of Nebraska, which secures to all persons accused of crime punishable by imprisonment in the penitentiary immunity from answering except upon presentment or indictment of a grand jury, and which immunity has not been taken away, abrogated, or in any manner abridged by the legislature of the State of Nebraska, and more particularly has it not been so taken away, abrogated, or abridged by said chapter 54 of the Criminal Code.

5. The court erred in holding "that chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that said section 10 of article 1 of the constitution of the State of Nebraska was enacted for the purpose of fixing definitely and certainly in the fundamental law that which should constitute in this State "due process of law," and that which should be "the law of the land," and by such holding the plaintiff in error has been deprived of his liberty without "due process of law," contrary to section 1, article 14, of the amendments of the Constitution of the United States.

50 6. The court erred in holding "that chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding contravenes article 5 of the amendments of the Constitution of the United States, which secures to all persons accused of infamous crimes immunity from answering unless on a presentment or indictment of a grand jury, and which said provision was required to be adopted and was adopted by the people comprised within the territory of the State of Nebraska pursuant to section 4 of the act of Congress passed April 19th, 1864, through and by which the people comprised within said territory were enabled to adopt a State constitution and become one of the States of the Union, by which premises the said article 5 of the amendments of the Constitution of the United States became, was, and is within the State of Nebraska

"due process of law" and "the law of the land," and by reason of which holding plaintiff in error has been deprived of liberty "without due process of law," contrary to section 1, article 14, of the amendments of the Constitution of the United States.

7. The court erred in affirming the decision of the district court of Douglas county, wherein and whereby the plaintiff in error was convicted of a high crime and sentenced to the penitentiary of the State of Nebraska for three several terms aggregating nineteen years, whereby plaintiff in error has been deprived of his liberty without due process of law, contrary to section 1, article 14, of the amendments of the Constitution of the United States, for that said supreme court of the State of Nebraska is the highest court in said State in which said cause can be heard and determined.

HENRY BOLLN,
By J. W. WEST,
His Attorney.

51 Be it remembered that heretofore, to wit, on the 30th day of March, A. D. 1896, Howard H. Baldridge, county attorney, filed in the office of the clerk of the district court in and for Douglas county, State of Nebraska, an information for embezzlement and grand larceny in the case of the State of Nebraska against Henry Bolln; and afterward, at the May term of said court, and on the 16th day of May, A. D. 1896, said defendant, Henry Bolln, was sentenced to the penitentiary of said State, and afterward, on the 26th day of May, 1897, warden's receipt for said Henry Bolln was filed herein, which said warden's receipt reads and is in the words and figures following, to wit:

NEBRASKA STATE PENITENTIARY,
LANCASTER, NEB., *May 25th*, 1897.

To the clerk of court:

This doth certify that J. W. McDonald, sheriff of Douglas county, Nebraska, did, on the day of the date hereof, deliver to me at the penitentiary, at Lancaster, the body of Henry Bolln (4 years, 5 years, & 10 years), who was tried, convicted and sentenced at the May term, 1896, of the district court of said county, held at Omaha, Nebraska, May 16, 1897.

GEO. W. LEIDIGH,
Warden of the Penitentiary,
By THOS. WELSH, *Dep.*

Sentence affirmed by supreme court May 18, '97.

52 In the Supreme Court of the United States of America.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.
} Petition for the Allowance of a Writ of Error.

To the Supreme Court of the United States or the honorable judges thereof:

Comes now the plaintiff in error, Henry Bolln, and shows to the court that heretofore, to wit, on or about the 1st day of June, 1897, by the decision and judgment of the supreme court of the State of Nebraska, being the highest court in said State in which a decision can be had, the judgment and sentence of the district court in and for Douglas county, Nebraska, was affirmed, by and through which the plaintiff in error was sentenced to the penitentiary of the State of Nebraska for a period of nineteen years and to pay a fine of more than two hundred thousand dollars, under which judgment and sentence the plaintiff in error has ever since been and now is deprived of his liberty by being confined in the penitentiary of the State of Nebraska, and while thus immured by, through, and under the said judgment and sentence he has been unable to come sooner, but comes now and humbly petitions this court for a writ of error from this court to the supreme court of the State of Nebraska upon the ground and for the reason that a Federal question is involved herein, namely:

1. Whether or not the plaintiff in error is not thus deprived of his liberty without due process of law, in violation of and contrary to the provisions of section 1, article 14, of the amendments to the Constitution of the United States, in this: That the plaintiff in error was tried, convicted, and sentenced for a felony made specially infamous as a high crime by the laws of Nebraska by the district court of Douglas county, Nebraska, without being first
53 indicted or informed against by a grand jury, but solely and alone upon the information of a public prosecutor, notwithstanding the fact that the constitution of the State of Nebraska provides immunity from such prosecution except upon an indictment or presentment by a grand jury, and which immunity it is claimed has not been abrogated or taken away in any manner whatsoever, and notwithstanding the Constitution of the United States likewise secures immunity from such prosecution except upon presentment or indictment of a grand jury, and which provision of the Constitution of the United States it is claimed by the plaintiff in error operates as a prohibition upon the State of Nebraska, because by section 4 of the act of Congress passed April 19th, 1864, being the enabling act through, by, and under which the people of the State of Nebraska adopted a constitution and frame of government and were admitted into the Union, the people of the State of Nebraska were required to adopt and did adopt as their fundamental law the Constitution of the United States, and particularly that part thereof which secures all persons immunity from prosecu-

tions for infamous offenses otherwise than upon presentment or indictment of a grand jury.

2. Because the constitution and the statutes of the State of Nebraska have, with great particularity, defined those processes by and through which persons may be convicted and sentenced for infamous crimes, in this, to wit, section XI, article I, of the constitution provides that "in all criminal prosecutions the accused shall have the right * * * to a * * * trial by an impartial jury." * * *

By legislative enactment, section 279 of the Code, the trial is defined thus:

"A trial is the judicial examination of the issues, whether of law or of fact in an action," and therefore, whether or not the supreme court of the State of Nebraska, in denying the plaintiff in error the right to a jury trial upon an issue of fact tendered by a special plea that plaintiff in error had had no preliminary examination, nor had he waived the same, violated the provisions of section 1, article 14, of the amendment of the Constitution of the United States, and whether or not thereby plaintiff in error has been deprived of his liberty without due process of law, all of which is made to more particularly appear by the assignment of error filed herein and the record in the case.

54 Wherefore plaintiff in error prays that the said errors herein complained of may be corrected and that he have full and speedy justice done him in the premises, and to that end that a writ of error issue to the supreme court of the State of Nebraska.

HENRY BOLLN,
Plaintiff in Error,
By JOEL W. WEST,
His Attorney.

Finis.

And nothing further.

JOHN C. COWIN AND
J. W. WEST,
Attorneys for Pl'ff in Error.

I hereby acknowledge service of the foregoing this 18th day of Sept., 1899.

C. J. SMYTH, *Att'y Gen.*

55 In the Supreme Court of the United States.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error. } Stipulation.

It is hereby stipulated by and between the parties to the above-entitled case that the certificate of the chief justice of the supreme court of Nebraska, setting forth the parts of the briefs filed in the supreme court of Nebraska by plaintiff in error, which contain the only reference made in said briefs by the plaintiff in error to the

Federal questions relied on in this court, and which certificate is now on file in the office of the clerk of this court, may be treated as a part of the record in said cause and printed as such in this court.

JOHN C. COWIN,
J. W. WEST,
Att'y- for Pl'ff in Error.
THE STATE OF NEBRASKA,
By C. J. SMYTH, *Attorney General.*

56 [Endorsed:] In the Supreme Court of the United States. Henry Bolln, plaintiff in error, *v.* The State of Nebraska, defendant in error. Stipulation. J. W. West, att'y for pl'ff in error. The State of Nebraska, by C. J. Smyth, att'y gen.

57 In the Supreme Court of the State of Nebraska.

HENRY BOLLN, Plaintiff in Error,
v.
THE STATE OF NEBRASKA, Defendant in Error. } Certificate of Chief Justice.

THE STATE OF NEBRASKA, *ss:*

I, T. O. C. Harrison, chief justice of the supreme court of the State of Nebraska, do hereby certify that the only reference made by counsel for plaintiff in error in written argument in this court in the above-entitled case to the Constitution of the United States or any part thereof or to any Federal law or to any part thereof is set forth in the following language, quoted from their brief in this case:

Sec. 10 of article I, of the Constitution, provides that "No person shall be held to answer for a criminal offense, * * * unless on a presentment or indictment of the grand jury: Provided, that the legislature may, by law, provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may, by law, abolish, limit, change, amend, or otherwise regulate the grand-jury system."

A criminal prosecution is not essentially different from an ordinary civil action at law; that is to say, before there is anything to try, there must be an issue of fact made by the pleadings. It is not necessary to go into the history of events that led up to the constitutional provision above set out which is practically the same as contained in our Federal Constitution, and I believe in the constitution of every State of the Republic.

It is sufficient to call to the minds of the court, that the abuses which followed from compelling the subject to answer to the accusation of a public prosecutor in the early times, became so
58 intolerable that it was thought to be of the first importance that immunity should be secured to the accused from making an issue of fact until the accusation should regularly come from the action of a grand jury. A whole community and even the King himself, might accuse, but the accusation challenged no answer

until it came from a grand jury. It would seem then that nothing short of a legislative enactment in the plainest and most unequivocal language, would be sufficient to take away so valued an immunity, and no legislative enactment should be permitted by mere implication to do so.

In this case, it will be observed that the defendant, at every stage of the proceeding, challenged the authority of the court to compel him to make an issue by plea to the information of the county attorney; and when called upon to plead, stood mute—not obstinately nor contumaciously—while the court entered a plea of not guilty for him.

The sole authority for the prosecution of offenses by information is found in chapter 54 of the Code.

The first section of the act confers jurisdiction upon the courts to try upon information, because without such a provision there would be no jurisdiction.

The second and third provisions relate to the form of the information.

The fourth section undertakes to make certain other provisions of law applicable to trials upon information, and the fifth provision relates to imprisonment and recognizances.

Nowhere in the act is there any express language that an accused shall be held to answer to the information of a public prosecutor as the language of the constitution gave authority to the legis-
59 lature to provide by appropriate legislation. In the whole act, there is nothing more than a bare implication that an accused should be required to enter a plea.

Upon this ground, the defendant claims that his trial upon the information of the county attorney was not only in contravention of the article of the constitution referred to, but was also in contravention of section 3, of article I, of our constitution, and also of section 1, of article XIV, of the Constitution of the United States, both of which provisions guarantee that no person shall be deprived of life or liberty without due process of law, and we now claim for our client the protection of those constitutional provisions.

Again, the provisions of the chapter referred to, are vastly wider in their scope than the title of the act would indicate. Nor is there anything in the title, "Prosecution of offenses by information" that would challenge the attention of the legislator that the bill was intended to be so far reaching as to provide for the prosecution of offenses of the gravity of felonies—that is where the punishment was by imprisonment in the penitentiary—by information of a public prosecutor and thereby supply such legislative authority as might be permissible under section 10, article I, of the constitution.

If the provisions of this law are in fact unconstitutional, every consideration of the public weal ought to prompt this court to so declare; for the time will certainly come when it will be discovered that the travail with which freedom was born and the bill of rights secured is a more certain proof of its excellence than the mere item of expense or cumbersomeness is a reason for its abolition.

Let us analyze: The constitutional immunity is from prosecu-

tions for offenses which are punishable as felonies and has
60 nothing to do with that class of offenses which are punishable by fine and imprisonment otherwise than in the penitentiary, and many of which were indictable. And the constitutional permission is for the legislature to enact by appropriate legislation for the prosecution of felonys by information.

Now chapter 54 has for its title, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

Surely there is nothing in the title that would lead one to suppose that the act following was to deal with the right of a public prosecutor to hold a person to answer for a felony. Again, when you come to analyze the act, there is absolutely nothing in it from beginning to end that authorizes the county attorney to file informations charging a person with a felony.

Sections 2 and 3 of the act are as follows:

SEC. 2. "All informations shall be filed during term, in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

SEC. 3. "All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person, and the offenses charged therein shall be stated with the same fullness and precision in matters of substance, as is required in indictments in like cases. Different offenses and different degrees of the same offense may be joined in one information, in all cases where
61 the same might, by different counts in one indictment; and in all cases a defendant or defendants shall have the same right, as to proceedings therein, as he or they would have if prosecuted for the same offense upon indictment."

These proceedings merely point out a procedure and give no authority for the procedure itself. The first section, as was said above, merely confers jurisdiction upon the courts—a jurisdiction which could not be exercised at common law though express authority were given to the county attorney to file informations and compel the accused to plead thereto. A court well might have conferred upon it, such jurisdiction, and yet there would be no implication that because it had such jurisdiction, that therefore, there must be some one with authority to file informations.

Section 7 of the same act provides: "Grand juries shall not hereafter be drawn, summoned, or required to attend at the sitting of any court within this State, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and file with the clerk of said court." This provision is in direct contradiction of chapter 39, title "Grand jury," and could have no force unless it had been enacted as an amendment to that chapter. It can claim no such validity, and is therefore absolutely void. It would seem

therefore to follow, that a grand jury should have been summoned for the February term of the district court of Douglas county, and the defendant had the right to have the accusation against him investigated by such grand jury.

We do not question the authority of the legislature to provide by suitable enactments for the trial of persons upon information for felonies and what has been above said in argument, has been so said with special reference to the case of Miller *vs.* The State,
62 45 Northwestern, 451, and we respectfully submit that none of the questions above discussed, seem to have entered into a consideration of that case.

The same question it will be observed, was raised by the defendant's plea in abatement which was disposed of by the court sustaining the demurrer of the State thereto as to all except the 9th paragraph which charged that the defendant had had no preliminary examination touching the crime charged in the information, nor had he waived the same. To this allegation in the plea in abatement, the State replied by denying each and every allegation contained in the said 9th paragraph of defendant's plea in abatement.

See page 27 of the record.

A trial was had upon that issue of fact in which the defendant demanded a jury, which demand was overruled and a trial was had to the court. Testimony of witnesses was taken on the part of the State and of the defendant.

See page 30 of the record.

The denial of the right of the trial by jury upon this issue of fact is assigned as error in the 85th paragraph of the petition in error.

The constitutional provision is, "The right of trial by jury shall remain inviolated * * *." That is, in every case where such a right was accorded prior to the adoption of our Constitution it remains now. Authorities upon this subject as applicable to the point in question appear to be meager.

We have the authority of this court for the proposition that the determination of such an issue as presented by the said 9th paragraph, must be raised by plea in abatement and a reply
63 thereto. A determination of that issue in favor of the defendant would just as effectually end the case as would a verdict in favor of the defendant upon the plea of former conviction or acquittal. The analogy would seem to require that the right of a jury trial in the one case would be just as essential as in the other. In all our research touching this question, we do not find that the right of a jury trial upon a question of fact has ever been denied in a law action, except perhaps in some cases of mutual account between the parties where it was well-nigh impossible for a jury to successfully unravel them.

Section 11 of the bill of rights, however, goes farther: "In all criminal prosecutions, the accused shall have the right to * * * a speedy public trial by an impartial jury."

Bouviere has adopted the following as his definition of a trial:

"The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." This definition is generally accepted by text writers and courts as being complete in itself.

The determination of the issue presented by this plea in abatement falls fairly within the definition.

In Bohanan *vs.* The State, 15 Neb., 209, this court denominated such a determination a trial and reversed the judgment of conviction because a trial had been refused. In this case, while a trial was not refused, a trial by jury was refused, and can hardly be less then reversable error.

The several counts of the information were separately attacked by motion to quash.

See pages 21 and 22 of the record.

And this motion ought to have been sustained as to all of the counts and to the whole information on the grounds stated above.

64 Dated November 10th, 1899.

[Ten cent U. S. internal-revenue stamp, canceled Nov. 10, '99. T. O. C. H.]

T. O. C. HARRISON,
Chief Justice.

STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of said State of Nebraska, do hereby certify that Hon. T. O. C. Harrison, by whom the foregoing certificate was made and given and in his own proper handwriting has hereunto subscribed his name, was at the time of his so doing and now is chief justice of said supreme court, duly commissioned and sworn and acting.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 13th day of November, A. D. 1899.

[Ten-cent U. S. internal-revenue stamp, canceled 11, 13, '99. D. A. C.]

D. A. CAMPBELL, *Clerk.*

65 [Endorsed:] File No., 17,507. Supreme Court U. S., October term, 1899. Term No., 393. Henry Bolln, pl'ff in error, *vs.* The State of Nebraska. Stipulation and addition to record. Filed Nov. 27, 1899.

Endorsed on cover: File No., 17,507. Supreme Court U. S., October term, 1899. Term No., 393. Henry Bolln, plaintiff in error, *vs.* The State of Nebraska. Statement of errors and designation by plaintiff in error of parts of record necessary to be printed. Filed September 22, 1899.